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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

JOHN MINOR WISDOM,
SAUL STONE,
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REPLY BRIEF FOR THE PETITIONERS

THE MILLER-TYDINGS AMENDMENT IS NOT ABSURD, FUTILE, OR INEFFECTIVE.

Petitioners contend that the Miller-Tydings Amendment means what it says: only contractual resale

price maintenance is permitted under the Sherman Act. The Government's position is the same:

> ". . . the Miller-Tydings Act means neither more nor less than what it says. By its terms, the Act removes the bar of the Sherman Act as to the specified voluntary contracts or agreements and does nothing more." (Brief of the United States, p. 18.)

Respondents argue that this construction would make the Amendment "absurd", "nugatory", "futile and ineffective", and that the Court should not adopt a construction which would make the Amendment "a futile and really absurd enactment . . . or useless or meaningless". (Respondents' brief, pp. 15-19.)

Certainly, compulsory resale price maintenance by notice would be an easy, convenient, and attractive scheme of price-fixing—for its beneficiaries. But it is not the only means of resale price maintenance and a Congressional enactment authorizing voluntary resale price maintenance by contract cannot be characterized as absurd, futile or meaningless.

The Amendment is necessary in order to authorize *voluntary* contracts fixing resale prices in transactions affecting interstate commerce. Without the Amendment such resale price maintenance by contract would be invalid under *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911) and other decisions. The traditional method of resale price maintenance was by contract. Although the Miller-Tydings Amendment is restricted to resale price

maintenance by contract only, the manufacturer still has at his disposal the means to maintain resale prices. "[Prior to the use of the non-signer clause] resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply." Shulman, *Fair Trade Acts*, 49 Yale L. Jour. 607, 618 (1940).

From the Stevens bill of 1914 to the last Capper-Kelly bill of 1933, all of the many resale price maintenance bills introduced in Congress proposed to sanction only voluntary resale price-fixing by contract. There is no doubt about this; the non-signer scheme was not devised until 1933. According to the respondents, all of this proposed federal legislation, promoted so persistently over such a long period of time, also would have been "absurd, futile, or meaningless". The National Association of Retail Druggists and several of the very corporations on whose behalf briefs have been filed in this litigation as *amici curiae* actively promoted these "futile" bills or were members of sponsoring associations. *FTC Report on Resale Price Maintenance* (1945), pp. 39-66.

Whether a statute has meaning or is "absurd and futile" should not depend on the extent of the trouble and inconvenience beneficiaries of the statute may be under in order to take advantage of the law. That Congress does not permit the method of price-fixing most convenient to manufacturers does not mean that the method permitted is futile. It is for Congress to determine the areas in which price-fixing will be al-

lowed in interstate commerce and to decide the terms under which price-fixing will be permitted, regardless of whether compliance with these terms may prove inconvenient.

A federal statute that would permit price-fixing to be imposed upon unwilling strangers to fair trade contracts would, of course, gratify manufacturers and producers of fair traded goods, but such a statute would be a radical departure from the principle of competition embodied in the Sherman Act.

Respondents seem to argue that a federal statute authorizing only contractual price-fixing either is futile or should be rewritten by the Court. Petitioners maintain that this statute is plain and unambiguous, and effective within the scope contemplated by Congress, and *should not be rewritten by the judiciary.*[1]

RESPONDENTS DO NOT ANSWER PETITIONERS' ARGUMENT THAT THE LANGUAGE OF THE MILLER-TYDINGS ACT IS THE LANGUAGE OF THE CAPPER-KELLY BILL DRAFTED AND INTRODUCED BEFORE THE NON-SIGNER SCHEME WAS EVER DEVISED.

Able briefs have been filed by the distinguished counsel for the respondents and their *amici curiae.*

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[1] *Cf. 62 Cases, More or Less v. United States,* No. 363, decided March 26, 1951, 19 Law Week 4187, 4188, where the Court stated:

"... *our problem is to construe what Congress has written.* After all, Congress expresses its purpose by words. It is for us to ascertain, neither to add nor to subtract, neither to delete nor to distort." (Italics supplied.)

In none of these briefs is there an adequate answer to petitioners' argument that the language of the Miller-Tydings Amendment is derived from bills that were introduced over a long period of years before the Seventy-Fifth Congress adopted the Amendment and is virtually identical with the Capper-Kelly bill of 1929. The language of these earlier bills was drafted and the bills were introduced before the non-signer scheme was ever devised. *Petitioners ask: at what point did the language suddenly change its meaning?* As drafted and introduced the statutory language was intended to legalize only resale price maintenance contracts held invalid under the *Dr. Miles* case, 220 U. S. 373 (1911). If the Capper-Kelly bill had been enacted in 1929, before there was any non-signer clause, no one would have contended that its language, which is substantially identical with that of the Miller-Tydings Amendment, permitted the imposition of resale price-fixing on strangers to fair trade contracts.

Respondents discount the identity in language between the Capper-Kelly Bill and the Miller-Tydings Amendment, arguing that a difference in purpose between the two *gives to the same language a difference in meaning.* All of their purposes may not have been the same.[2] But to the extent that the purposes may be inferred from the plain language of the Capper-Kelly bill and the Miller-Tydings Amendment,[3] the purposes *were* the same. To the extent

[2] The Capper-Kelly bill was an independent statute; the Miller-Tydings bill was an amendment to the Sherman Act.

[3] The phrase "or other conditions" was removed from the Miller-Tydings bill before enactment, making the Act parallel the Capper-Kelly almost exactly. See petitioners' original brief, pp. 56-57, 83-92.

that both intended to authorize limited resale price maintenance in interstate commerce, the purposes were the same. And to the extent that both manifested an intention to limit the resale price maintenance to permissive contracts, the purposes were the same. And this is the crux of the case. Under neither bill is there any license for a scheme of compulsory price-fixing imposed on non-contracting parties. The identity of meaning and application is demonstrated by an identity of language, used for the identical purpose of authorizing limited resale price maintenance in interstate commerce.[4]

A Capper-Kelly bill actually did become law. In 1931 California enacted a "Junior Capper-Kelly Law", substantially identical with the Capper-Kelly bill introduced in Congress and, of course, substantially identical with the Miller-Tydings Amendment. But at the state level, in 1933, in order to reach non-signers, California found it necessary to amend the statute by adding the non-signer provision now found in all fair trade laws. The "Junior Capper-Kelly Law" of California was not broad enough to include non-signers at the *state level;* nor is its twin, the Miller-Tydings Amendment, broad enough to permit price-fixing against non-signers at the *federal level.*

[4] The Capper-Kelly bill and the Miller-Tydings Amendment are printed in parallel columns in petitioners' original brief, Appendix D, p. 65.

RESPONDENTS DO NOT ANSWER PETITIONERS' ARGUMENT THAT THE MILLER-TYDINGS AMENDMENT IS SECTION 1, THE CONTRACT CLAUSE, OF A TYPICAL FAIR TRADE LAW; IT IS NOT SECTION 2, THE NON-SIGNER CLAUSE.

Exhaustive briefs have been filed. But when all is said that can be said, one salient fact stands out. At the time Congress enacted the Miller-Tydings Amendment it had before it typical fair trade laws. Each contained two basic provisions: (1) the contract clause, and (2) the non-signer clause. *Congress saw fit to validate only the contract clause.* The Miller-Tydings Amendment, like the Capper-Kelly bill, parallels, word for word, Section 1, the contract provision of state fair trade acts. It has no reference whatever to Section 2, the non-signer clause. It would have been simple for Congress to have authorized resale price-fixing generally or to have taken some statutory cognizance of the non-signer clause. Congress decided otherwise. The language is clear and unambiguous. It can be taken only as a deliberate decision to sanction resale price maintenance by specified voluntary contract, but not to sanction a system of compulsory, uniform, price-fixing binding on unwilling strangers to fair trade contracts.

There is no adequate answer to this argument in any of the briefs by respondents or their *amici curiae.*

The attempted explanation offered by respondents is that a non-signer provision was unnecessary in the Miller-Tydings Amendment, since the cause of action against non-signers (liability in tort) is a product of the state's

exercise of its police power and is a state action to which the Sherman Act does not apply. In other words, respondents argue that action by the state in authorizing resale price-fixing to be imposed on non-signers and in creating a cause of action against non-signers is sufficient "state action" to insulate such price-fixing from the Sherman Act. By the same token, a state law authorizing resale price maintenance under a fair trade contract would also be "state action" and, under respondents' view, the Miller-Tydings Amendment would not have been necessary in the first place. The question of "state action" is dealt with in petitioners' brief (pp. 20-23) and is fully answered in the brief of the United States (pp. 7-10). It suffices here to say that the criterion of state action established in *Parker v. Brown*, 317 U. S. 341 (1943) and *United States v. Southeastern Underwriters Ass'n.*, 322 U. S. 533 (1944), is active participation by the state in the price-fixing or rate-making, not immunity for private price-fixing or encouragement to private restraints under an unsupervised, standardless statute.

Petitioners maintain that the Sherman Act is a positive declaration by Congress that there shall be competition in interstate commerce. Congress has preëmpted this field. Federal legislation, therefore, is necessary to except from the Sherman Act (1) resale price maintenance by contracts and agreements and (2) non-contractual resale price maintenance which eliminates price competition. Congress, following the Capper-Kelly bills and *all* prior bills on the subject, saw fit to sanction, in the Miller-Tydings Amendment, only specified voluntary contracts

and agreements which meet certain conditions, and nothing more.

Whatever promoters of price-fixing may have tried to obtain or thought that they obtained in the enactment of the Miller-Tydings Amendment, they did not get what they needed to force price-fixing under color of law on unwilling, non-contracting parties in transactions affecting interstate commerce.

CONCLUSION

For the reasons previously stated in petitioners' original brief and for the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

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CERTIFICATE

This is to certify that copies of this brief have been served on opposing counsel on this ..... day of ....., 1951.

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